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Local Flood Control: Using Idaho's Flood Control District Statute to Enable Place-Based Stream Restoration

Jerold A. Long
Samuel Finch



During the 1980s and 1990s, a Teton County developer slowly converted a one mile stretch of Teton Creek's wide floodplain and riparian area, which was historically comprised of three distinct stream channels, into a single, straight, deep, un-vegetated sluice. This alteration of the natural stream channels caused floodwater to pick up both speed and sediment, leading to recurring damage to the surrounding property. If this sounds inappropriate, it is. The developer's activities violated Section 404 of the Clean Water Act, which requires a federal permit before discharging any dredged or fill material into "waters of the United States." While he did not go willingly, the developer ultimately served time in federal prison for criminal violations of the Clean Water Act.¹

But what of the stream? Prior to the stream's channelization, and dewatering by the Grand Teton Canal Company, Teton Creek provided important habitat for Idaho's native Yellowstone Cutthroat Trout. Now, with an eroding headcut migrating upstream, and increased sediment loads depositing downstream, parts of the stream serve more as an erosive force and sediment transport system than a stream. With its damaged aesthetics and compromised ecological health and function, Teton Creek begs for attention. Although local government and community organizations have begun to restore part of the degraded stream corridor, much of the damage still remains, and local land and homeowners and the city of Driggs face an increased risk of harm from flooding.

While the developer's brazen disregard for legal requirements might make Teton Creek somewhat unique, the resulting stream-channel alterations unfortunately are not. In Idaho alone over 7,000 miles of stream channels are impaired by the physical conditions of the stream, either through

Although local government and community organizations have begun to restore part of the degraded stream corridor, much of the damage still remains.



flow or physical-habitat alterations.² In other words, due to dewatering, stream channelization, erosion, or other degradation of the stream channel and floodplain, these 7,000 miles of streams cannot serve the beneficial uses designated by the people of Idaho. An additional 7,364 miles of streams are impaired due to increased temperatures, and 4,780 miles are impaired by sediment or siltation. Idaho is not alone in this. Across the Intermountain West, silt, sediment, temperature, low flows, and other morphological alterations impair thousands of stream miles.³ These streams are compromised not only ecologically and aesthetically, they also lack natural flood control properties. This leads to increased frequency and severity of flood events.

Idaho communities do have the capacity to remedy these failings and restore their degraded streams. Idaho's Flood Control District Statute⁴ allows for grassroots, place-based, locally-managed efforts to restore degraded stream systems and allow for the natural control and mitigation of floodwaters, while simultaneously providing for the conservation of Idaho's water resources. Historically, flood control districts have mitigated floods by implementing stream-channel-altering flood control methods such as dikes, levees, dams, and canals. But more recently, local communities are exploring creating flood control districts that take advantage of a stream's natural flood control properties through stream res-

toration. Place-based stream restoration has the benefit of improving locally-desired aesthetic, health, ecological, and economic resources, in addition to flood control. The Idaho Department of Water Resources ("IDWR") should encourage the use of flood control districts to achieve locally-identified stream restoration — and flood control — goals.

Place-based Flood Control

In Idaho local communities can petition the Director of the IDWR to create flood control districts.⁵ Flood control districts are local taxing districts authorized to levy a small property tax to fund and implement flood control operations.⁶ The powers granted to flood control districts are broad, allowing for a wide range of actions, but arguably limited by the general policy statement of the enabling statute: "to provide for the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources."⁷

While it appears that all Idaho flood control districts have historically limited their efforts to traditional physical stream-channel-altering flood control methods, the statute does not require that approach. The statute does not specify any required methods of flood control. Rather it only requires that the petition explain the "method or system of flood control" to be used by the proposed district, and demonstrate that such flood control methods are "a

proper and advantageous method of accomplishing the relief sought or the benefits to be secured.”⁸ The statute’s general purpose is clear, but it leaves the specific means of achieving that purpose in the hands of the local community.

In articulating the numerous powers granted to flood control district commissioners, the statute specifically recognizes that natural stream systems can serve a flood control purpose. The statute grants commissioners the power “to use natural streams and to improve the same for use as a flood control structure.”⁹ The statute further provides that “in the event that use of the natural stream involves alteration of the stream channel,” such alteration requires approval by the IDWR Director.¹⁰ This provision indicates that the use of natural streams as contemplated by the statute does not necessarily include stream channel alteration — it may include it, but may instead involve preservation or restoration of the natural system.

These elements of the flood control district statute — broad authority to act in the public interest, a preference for local control, and the specific authorization of the use of natural streams for flood control purposes — suggest several flood control alternatives. A community may use a flood control district to fund stream restoration activities that both reduce the potential for flood damage and achieve locally-desired ecological, aesthetic, and economic development goals. In other words, the historical use of flood control districts in Idaho for constructing physical flood control methods is not mandated by the statute. In many cases, preservation or restoration of the natural stream may be a better flood control approach.

Using Nature to Control Floods

Of course, using stream restoration or preservation as a flood control tool requires that natural stream conditions actually serve flood control purposes. The evidence for this is overwhelming. As demonstrated tragically by Hurricanes Katrina in 2005 and Sandy in

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2012,¹¹ and through hundreds of on-the-ground research projects over several decades,¹² natural riparian systems play a vital role in absorbing flood waters and reducing the harm to land and structures built near flood plains. This role cannot be replicated fully by artificial flood control approaches. Natural stream systems contain many mechanisms to control floodwaters, and restoring an altered stream to its natural state can improve the flood control capacity of that stream.

Because stream restoration achieves both flood control and local ecological or aesthetic goals, several western states already use restoration as part of the tools available to flood control districts. In Washington, the Donald Wapato Levee Removal Project in Yakima County — funded and implemented by the Yakima County Flood Control Zone District¹³ — restored 100 acres of floodplain. This has reduced flood overflows, and improved riparian habitat, native plant communities, and fish populations. Similarly, Arizona’s flood control district statute specifically advocates for flood control solutions that use stream restoration practices.¹⁴ In the Arlington Valley Flood Plain Acquisition Project,¹⁵ the Maricopa County Flood Control District purchased an elementary school in a flood prone area, demolished the building and restored the floodplain’s natural conditions. While this might seem a drastic measure, relocating the school was more cost effective than leaving it in place and attempting to protect it from the flooding Gila River. In both cases, local communities implemented stream restoration under flood control

authority enabled by legislation very similar to Idaho’s flood control district statute.

Resolving Uncertainty and Establishing Local Control

While Idaho’s flood control district statute should allow for the use of place-based stream restoration efforts, two uncertainties exist in the statute. First, although natural streams can be used for flood control purposes under the statute’s broad purpose and delegated powers, apparently no Idaho flood control district has implemented stream restoration as a flood control tool. Further, neither the statute nor the IDWR explicitly support that particular tool. Second, and perhaps more troubling, the statute’s broad grant of authority to district commissioners — with few explicit restrictions on how that authority is used — leaves flood control districts prone to capture by interests that might favor traditional, stream-channel-altering flood control approaches, even where the local community may prefer otherwise. Legislative attention to these two issues is unnecessary. When a petition contemplates the use of stream restoration as the method of flood control, the IDWR Director should clarify when granting the petition that the authority of the flood control district is limited by “proposed method or system of flood control” described in the petition. The proposed method or system may specifically include and be limited to stream restoration.

The statute requires that the petition to establish a district contain two elements that suggest that the legisla-

ture intended a district's power be determined and limited by the petition that created it. First, all petitions must specify the "object of the organization of the district."¹⁶ As demonstrated by the petition requirements that follow, the word "object" in this sentence means "purpose" or "goal." Because the entire statute requires that all districts achieve flood control in some form, this requirement that the petition describe the purpose of a particular flood control district indicates that an individual flood control district may have a purpose that is more specific than that statute's general goal. For example, the petition might describe as its purpose the mitigation or controlling of floods by restoring the stream's natural condition. Similarly, a specific flood control district might provide that its purpose is to restore a floodplain by purchasing private lands that might otherwise be developed and exacerbate stormwater runoff. Both purposes achieve the statute's general goal, but in a specific, locally-appropriate way.

The petition must also describe how establishment of the district, and use of the proposed method or system of flood control, "is a proper and advantageous method of accomplishing the relief sought or benefits to be secured."¹⁷ As noted above, the reference to "relief sought or benefits to be secured" only makes sense if a district can have a purpose that is more specific than simply "flood control." More important, the requirement that a petition describe both the proposed method and system of flood control and how it will achieve the proposed district's specific goals demonstrates that the method or system described is an integral part of the district itself. This requirement would be meaningless if the district could ignore both the purpose and method or system described in the petition. The only reasonable interpretation of this requirement is that the petition itself — as approved by the registered voters in the proposed district — describes and limits the range of actions that might be undertaken by the district. Any other interpretation renders the petition requirements a mere formality, to be ignored once the district is approved.

In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.



The procedure by which a petition is approved also indicates that the authority granted a specific district can and should be constrained as described in the petition itself. After considering a petition, the Director has three options. The Director may approve the petition as submitted, may deny the petition, or may recommend a district different from that described in the petition.¹⁸ When the alternative district recommended is "materially different" from that described in the petition, the registered voters in the proposed district must approve the revised district in the same manner required for the original petition.¹⁹ Because the original petition need only describe the "temporary boundaries of the proposed district," and because the materially different provision refers to the petition in its entirety, the materially different language must refer to more than simply the proposed district's geographic boundaries. A materially different flood control district would be a district with a different purpose, or with a different proposed system or method of flood control. If the statute did not limit the authority of flood control districts to the purpose, and system or methods, described in the petition, this "materially different" language would be irrelevant.

A plain reading of the statute indicates that it both authorizes the use of stream restoration and limits the acceptable tools and powers of a specific district to those that carry out the specific purpose, and use the specific system or methods, described in the petition. Any other interpretation renders significant aspects of the statute largely meaningless and would invali-

date the goals and desires of the taxpayers who approved and fund the district. In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.

Conclusion

Idaho is home to more miles of streams and rivers than any other western state. And those streams, and the communities that surround and love them — from the Bruneau Canyon to the deep forests of North Idaho or the high alpine streams flowing out of the Tetons — are incredibly diverse. What might work to control floods and achieve locally-desired aesthetic, ecological, or economic development goals in Weiser might not work in Driggs. Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture. This includes stream restoration and preservation. Idaho law authorizes and supports local control and funding of flood control efforts. The Idaho Department of Water Resources should promote the use of locally-designed programs to achieve local goals that are consistent with the state-wide interest in conserving our water resources. Stream restoration and related flood management approaches provide local communities more options to manage floodwaters and water resources, while strengthening those local communities and cultures, preserving and conserving the state's water resources, and improving degraded streams in our great state.

End Notes

1 See *United States v. Moses*, 2006 WL 1459836 (D. Idaho 2006), affirmed by *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), certiorari denied by *Moses v. United States*, 554 U.S. 918 (2008), and post-conviction relief dismissed by *United States v. Moses*, 642 F.Supp.2d 1216 (D. Idaho 2009).

2 See Idaho's 2010 Integrated Report (August 2011), available at <http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>.

3 See, e.g., *United States Environmental Protection Agency, National Rivers and Stream Assessment, 2008-2009 (Draft)*, (Feb. 28, 2013).

4 Idaho Code Ann. §542-3101 to 3128.

5 See Idaho Code Ann. §42-3105.

6 The property tax assessed by a flood control district may be no more than 0.06% of a property's assessed value, unless a higher amount is approved by voters. See Idaho Code Ann. §42-42-3115(1).

7 Idaho Code Ann. §42-3102.

8 Idaho Code Ann. §42-3105(3).

9 Idaho Code Ann. §42-3115(14).

10 Id.

11 In Louisiana, the use of dikes and channelization to control the Mississippi River has caused the loss of more than 5,000 square kilometers of wetlands in the Mississippi River Delta since 1900. These wetlands formerly served as a buffer that reduced the storm surges and flooding associated with hurricanes or other significant storms. See John W. Day, Jr., et al., *Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita*, 315 SCIENCE 1679 (2007); *Some of Hurricane Sandy's effects were exacerbated by coastal development, which eliminates the buffering capacity of coastal wetlands and dunes and can increase severity of storm surges*. See, e.g., John Rudof, et al., "Hurricane Sandy Damage Amplified by Breakneck Development of Coast," Nov. 11, 2012, available at [http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html)

[damage_n_2114525.html](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html) (last accessed Apr. 1, 2013); see also Robert A. Monton, *Factors Controlling Storm Impacts on Coastal Barriers and Beaches: A preliminary basis for near real-time forecasting*, 2002 J. COASTAL RES. 486.

12 See, e.g., Cynthia Berlin & James Handley, *Wetlands as Flood Control: The case of the La Crosse River marsh*, 50(2) FOCUS ON GEOG. 7 (2007); Ted Sommer, et al., *California's Yolo Bypass: Evidence that flood control can be compatible with fisheries, wetlands, wildlife, and agriculture*, 26(8) FISHERIES 6 (2001); Donald L. Hey & Nancy S. Philippi, *Flood Reduction through Wetland Restoration: The Upper Mississippi River basin as a case history*, 3(1) RESTORATION ECOLOGY 4 (1995); Taylor A. Delaney, *Benefits to Downstream Flood Attenuation and Water Quality as a Result of Constructed Wetlands in Agricultural Landscapes*, 50(6) J. SOIL & WATER CONSERVATION 620 (1995).

13 See <http://www.yakimacounty.us/surface-water/FCZD.htm>.

14 See Ariz. Rev. Stat. §48-3603(C)(20)(b).

15 See <http://www.fcd.maricopa.gov/Projects/PPM/projStructDetails.aspx?ProjectID=5>.

16 Idaho Code Ann. §42-3105(1).

17 Idaho Code Ann. §42-3105(3).

18 See Idaho Code Ann. §42-3108.

19 Id.

Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture.

About the Authors

Jerrold A. Long is an associate professor at the University of Idaho College of Law in Moscow. Professor Long grew up in Rexburg, Idaho. He received a B.S. in Biology from Utah State University and a J.D. from the University of Colorado-Boulder. After practicing law for several years, Professor Long returned to graduate school and earned a Ph.D. in Environment and Resources from the University of Wisconsin-Madison.



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(as of May 9, 2012)**

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Jenya Shanayeva aka Yevgenia Igorevua Shanayeva Boise, ID <i>Syracuse University College of Law</i>	Matthew Christopher Starr Moscow, ID <i>University of Idaho College of Law</i>	Mark William Thompson Boise, ID <i>University of Idaho College of Law</i>	Dane C. Whipple Las Vegas, NV <i>University of Nevada, Las Vegas, Wm S Boyd School of Law</i>
Brian Douglas Sheldon Moscow, ID <i>University of Idaho College of Law</i>	Benjamin Edward Stein Boise, ID <i>St. Thomas University School of Law</i>	Taylor Wayne Tibbitts Salmon, ID <i>University of Virginia School of Law</i>	Nichole Hannah Wilk Phoenix, AZ <i>Gonzaga University</i>
John Christopher Shirts Weiser, ID <i>University of Colorado School of Law</i>	Ashlen Michelle Strong aka Ashlen Michelle Anderson Portland, OR <i>The George Washington University Law School</i>	Robert Douglas Todeschi Eagle, ID <i>University of Idaho College of Law</i>	Mark T. Wilson Missoula, MT <i>University of Montana School of Law</i>
Allen James Shoff Moscow, ID <i>University of Idaho College of Law</i>	Matthew Paul Stucki Pocatello, ID <i>University of Idaho College of Law</i>	George Joseph Tomlinson Rochester, NY <i>The Thomas M. Cooley Law School</i>	Michael F. Winchester Idaho Falls, ID <i>University of Idaho College of Law</i>
Sara Catherine Simmers Eagle, ID <i>University of Idaho College of Law</i>	Blake D. Surerus Carey, ID <i>University of the Pacific, McGeorge School of Law</i>	Brian David Trammell Moscow, ID <i>University of Idaho College of Law</i>	Zachary S. Zollinger Ann Arbor, MI <i>The University of Michigan Law School</i>
Michael Peter Sinks Kalispell, MT <i>University of Idaho College of Law</i>	Andrew Lloyd Swanson Pocatello, ID <i>University of Idaho College of Law</i>		

**NEW ADMITTEES
DIRECTORY UPDATES
Admitted 5/2/13 and 5/3/13**

Cheryl Anne Allaire	Bryce Erick Downer	Steven A. Langford	Christine Lynn Reinert
Christopher Richard Ambruso	Amie J. Dryden	Benjamin Oliver Layman	Stephanie Riley
April Lynn Anderson	Eleanor A. DuBay	Robert Henry McQuade Jr.	David Aaron Roscheck
Jeremy J. Andrew	Aaron Eddington	Brian McTague	Mark Rees Scoville
Tyler James Black	Catherine Elizabeth Enright	Daniel Richard Charles Mortensen	Jody Elizabeth Smith
Ryan Ronald Bolander	Jonathon Frantz	Adam Thompson Mow	John Thomas Spalding
James Browitt	Chip Giles	Michael Louis Myers	David L. Spoede
Thomas A. Bushnell	Isaiah Lee Govia	Joshua Mark Lawless Nelson	Jeremiah Trent Stoddard
Michael David Bybee	Max A. Hansen	Garrett James Oliverson	Joel Dee Tague
Wm. Hunter Campbell	Nancy Ann Hurd	Danielle Therese Pare	Matthew Robert Thompson
Stephen Paul Carpenter	Trevor Elliott Jack	Florence J. Phillips	Erin Emily Tomlin
S. Bret Clark	Ryan D. Jenks	Andrakay J. Pluid	Lauren Eileen Vane
Jeffrey Lee Cotton II	Joelle Sarah Kesler	Jillian Hana Potts	Nicholas Alexander Warden
Jennifer Rose DeHaan	Brady Ward King	Devin William Quackenbush	Bryan J. Wheat
Kent Neil Doll Jr.	Gary Mitchell Kirkham	Sarah Maureen Reed	David Jay Wilson

Craig begins Durham Law Office PLLC

Craig Durham announces that he has formed his own firm, Durham Law Office, PLLC. His general practice will have an emphasis on criminal trial defense, criminal and civil appeals, state and federal post-conviction relief, and civil rights litigation. Mr. Durham welcomes referrals.



Craig Durham

For nearly 10 years, Mr. Durham was a staff attorney for the United States District Court in Boise, where he assisted federal judges in managing capital and non-capital habeas corpus cases and prisoner civil rights cases. Before working at the Court, Mr. Durham served as a trial and appellate public defender. He received his law degree from University of Kansas School of Law and is admitted to practice in Idaho, Kansas, and the Ninth Circuit Court of Appeals.

The Durham Law Office is located in the 8th Street Marketplace at 405 S. 8th Street, Suite 372, in Boise. Mr. Durham can be reached at (208)-345-5183 or at craig@chdlawoffice.com.

Idaho attorneys spoke at Litigation Counsel of America Conference

The Litigation Counsel of America invited Wade L. Woodard and Thomas A. Banducci of Andersen Banducci PLLC spoke at its 2013 Spring Conference & Induction of Fellows, which took place May 2-4, in Newport Beach, Calif.



Wade L. Woodard

As trial lawyers with more than 45 years of combined experience, Mr. Woodard and Mr. Banducci spoke about how Andersen Banducci approaches jury trials, and specifically how they

develop themes that resonate and connect with juries. Their presentation was made to Fellows of the LCA, an honorary trial lawyer society that represents less than one-half of one percent of American lawyers. Fellowship in the Litigation Counsel of America is highly selective and by invitation only. Fellows are carefully selected based on evaluations.

Also Fellows in the LCA, Mr. Woodard and Mr. Banducci are partners in the newly formed litigation firm of Andersen Banducci PLLC.

Attorney Michelle Gustavson Earns Junior League Community Service Award

Hawley Troxell announced attorney Michelle Gustavson received the Junior League of Boise Community Service Award during the League's 85th Anniversary Gala on May 3. The community service award is granted to one member for her volunteer work within the League and throughout the community.

Gustavson received this award based on her work within the League as the 2012-2013 program chair for an effort to help pre-teen girls called "Especially Me! (EM)." It was developed to help girls ages 9-12 navigate the upcoming changes in their lives through building and maintaining positive self-esteem and good decision making skills to promote happy, healthy futures. Since taking over as chair in May of 2012, Gustavson



Thomas A. Banducci

has dedicated over 400 volunteer hours to restructure the program, update the curriculum, teach classes, lead training sessions, form community partnerships, and apply for grant funds. Under

her leadership, the program has almost doubled in size from the prior year reaching 86 girls and has expanded to more local elementary schools.

Gustavson is an attorney in the firm's business and finance, banking, real estate, and social media groups. She assists clients with complex commercial real estate financing, loan documentation, legal opinions, and various employment matters, including social media policies. Gustavson's additional community involvement includes serving on the Idaho Women Lawyers (IWL) Board of Directors, Chair of the IWL Community Service Subcommittee, Vice Chair of the Idaho State Bar Business and Corporate Law Section and Chair of the Section's Annual CLE Committee, and serving on the American Heart Association Go Red for Women Logistics Committee.

Tracy Crane joins Anderson & Hull LLP

The law office of Anderson, Julian & Hull LLP, announced that Tracy J. Crane joined the firm as a senior associate in February. Mr. Crane received his B.S. and M.S. degrees in Geology at Idaho State University in 1996 and 2000. He received his J.D. degree from University of Idaho College of Law, summa cum laude in 2003. Mr. Crane has extensive experience in commercial and complex litigation.



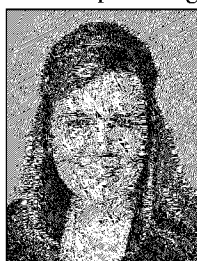
Tracy J. Crane

Publication honors 10 attorneys as "Accomplished Under 40"

The *Idaho Business Review* has recognized 10 attorneys among those selected for the publication's "Accomplished Under 40" recognition listing.

"These are talented young professionals. They are shaping our state, our image and our expectations," said IBR President and Publisher Sean Evans.

This year, 129 were nominated, and 65 completed the application process.



Michelle Gustavson

OF INTEREST

A six-member selection panel of past "Accomplished Under 40" recipients scored the applicants in four categories: professional accomplishments, leadership skills, community involvement and long-term goals.

University of Idaho College of Law Professor Wendy Couture, a member of the 2012 class of "Accomplished Under 40," said in her profile, "I used to think 40 sounded old. Now, I think it sounds young. I'm happy to have my accomplishments recognized at this stage in my life, and I hope I have a long career ahead of me."

The 2013 Accomplished Under 40 magazine will be published with the June 14 issue of Idaho Business Review. The event – networking reception, dinner and awards ceremony – will be held at the Knitting Factory June 13. For tickets, visit idahobusinessreview.com/events/au40/.

2013 Accomplished Under 40 includes the following attorneys:

- D. John Ashby, Hawley, Troxell, Ennis & Hawley LLP
- Allison Blackman, Stoel Rives LLP

- Matt Darrington, Robinson, Anthon & Tribe Attorneys at Law
- Michelle Gustavson, Hawley, Troxell, Ennis & Hawley LLP
- Erika Malmen, Perkins Coie LLP
- Joe Meuleman, Meuleman Mollerup LLP
- Scott Randolph, Holland & Hart LLP
- Sarah Q. Simmons, The Erica Law Group PA
- Hilary Soltman, First American Tile Company
- Josh Taylor, Pickens Law PA

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